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STATE OF MONTANA
Case Number: DA 23-0248

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0248

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DILLON PATRICK PIERCE,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, the Honorable Robert Whelan, Presiding

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STATEMENT OF THE ISSUES

1. Sexual intercourse without consent (SIWOC) is a conduct-based offense. The District Court instructed the jury on the *result*-based definition of "knowingly"; that Dillon Pierce was guilty if he was aware of a "high probability" his sexual encounter with K.R.[1] was nonconsensual. Did the District Court err, and did this lower the State's burden of proof on the main issue in dispute—what Dillon knew?

2. The State's theory was that K.R. was too drunk to consent to sex, as evidenced in part by her high blood alcohol concentration (BAC). Dillon's response was K.R. did not *appear* incapable of consent. The District Court excluded defense expert testimony about how regular alcohol use may cause a person to appear less intoxicated than their alcohol consumption and BAC would otherwise suggest. Was this error?

STATEMENT OF THE CASE

K.R. invited Dillon to her home on a Thursday evening in December 2019 in Butte, and they had sex. (State's Exhibits (Exs.) 6B–6F; 3/21–3/22/2022 Trial Transcript (Tr.) at 173–79, 349–50.) Dillon

[1] Although not required by the Rules of Appellate Procedure, *see* M. R. App. P. 10(6), this brief will use the alleged victim's initials out of respect for her privacy. This is not meant to imply credence to K.R.'s claims.

understood the sex was consensual. (Tr. at 175, 490.) K.R. claimed it was not. (Tr. at 179.) Over a year later, the State charged Dillon with SIWOC. (District Court Document (Doc.) 2 at 8; Doc. 5.)

At trial, the defense acknowledged Dillon and K.R. had sex and that K.R. was drunk when she invited Dillon over. (Tr. at 173–75.) But in response to the State's evidence of K.R.'s heavy intoxication, the defense argued that even if K.R. was so drunk she was incapable of consent, Dillon reasonably did not know that. (*See* Tr. at 485, 491.)

The District Court rejected the defense's proposed jury instruction that the "knowingly" element of SIWOC required proof Dillon was "aware" K.R. could not or did not consent to sex. (Doc. 54.1; Tr. at 439–40.) Instead, the District Court adopted the State's proposed instruction that Dillon acted knowingly if he was aware of a mere "high probability" the sex was nonconsensual. (Doc. 50, Proposed Instr. 12; Doc. 59, Instr. 16 (Given jury instruction on "knowingly," attached as Appendix B); Tr. at 440.)

The District Court also barred the defense from examining a proffered expert witness about how K.R.'s routine alcohol use may have caused her to exhibit fewer signs of intoxication than one might expect

from her heavy drinking and high BAC that night. (Doc. 51 (Order granting State's motion in limine, attached as Appendix C).)

After the jurors initially asked during deliberations, "What happens if we don't come to a unanimous decision?" they ultimately found Dillon guilty. (Docs. 59.1, 60.) The District Court sentenced him to the Montana State Prison for 20 years with 5 suspended. (Doc. 133 at 2 (Judgment, attached as Appendix A).) Dillon filed a timely notice of appeal. (Doc. 136.)

STATEMENT OF THE FACTS

K.R. and Dillon knew each other through mutual friends and K.R.'s brother, with whom Dillon was friends. (Tr. at 178.) Dillon and K.R. socialized together a handful of times and became "friends" on Facebook. (Tr. at 178–79.) One time, K.R. and her brother came over to Dillon's house, and K.R. took a liking to Dillon's dog. (Ex. 10 at 00:26:10–00:26:44.) Dillon and K.R. occasionally ran into each other at the bars in Butte. (Ex. 10 at 26:56.)

Dillon was interested in K.R., so he sent her a "wave" on Facebook Messenger in September 2018 and again in June 2019, but she never responded. (Ex. 6A.) Dillon tried his luck again by sending her a "wave"

on Thursday, December 5, 2019, at 8:50 p.m. (Ex. 6B.) This time K.R. responded: "Come drink." (Ex. 6B.)

Dillon wrote back and invited K.R. to his place. (Ex. 6B.) K.R. messaged back that she had to be home by 11:00 p.m. but, "I got cash come drink." (Ex. 6B.) Dillon reiterated his offer that she come to his place and told her she could still be home by 11. (Ex. 6C.) K.R. replied she was at Maloney's bar, she was going to stay there awhile, and yet again invited Dillon to "come drink." (Ex. 6C.)

Dillon decided to send K.R. a suggestive message: "what would I get for doing so there lil lady?" (Ex. 6C.) K.R. responded, "Imma head home so never mind." (Ex. 6C.) Dillon said, "Just come drink here," but K.R. said she had to work at 5:00 a.m. the next morning at her welding job. (Ex. 6C; Tr. at 177.)

Dillon told K.R. he similarly had to work at 6:00 a.m. (Ex. 6D.) K.R. then messaged Dillon, "I gotta find my rig. I'm fucked ip[2] [sic]." (Ex. 6D.) Dillon responded, "Jesus" and "Yeah then come here." (Ex. 6D.) K.R. said, "Tell me about it" and reiterated she needed to

[2] As defense counsel pointed out below, the "u" and "i" keys are adjacent to each other on a keyboard. (Tr. at 483.)

remember where she parked her car. (Ex. 6D.) Dillon bantered, "Kinda bad you forget [sic] that." (Ex. 6D.) K.R. then messaged Dillon, "I found it," and he replied, "Good job!!" (Ex. 6D.) K.R. told Dillon she was close to her home so she was "probably gonna head there." (Ex. 6E.) Dillon replied, "I don't live far from Maloney's." (Ex. 6E.)

K.R. then called Dillon over Facebook Messenger, and they talked for 1 minute and 11 seconds. (Ex. 6E.) At some point after that call,[3] K.R. wrote Dillon, "I'm home." (Ex. 6E.) Dillon told her, "I'll be there soon" and asked, "What's the address again." (Ex. 6E.) K.R. messaged him her address. (Ex. 6E.)

K.R. reminded Dillon she could not stay up late because she had to work in the morning. (Ex. 6F.) Dillon responded, "That's fine," and she said, "Alright." (Ex. 6F.) Dillon wrote, "Give me twenty I'll be there." (Ex. 6F.) K.R. reiterated she had to be in bed by 11, and Dillon said, "You will be." (Ex. 6F.) In her final message, K.R. again reiterated her bedtime and told Dillon, "My door[']s unlocked." (Ex. 6F.)

[3] None of the messages between K.R. and Dillon that night contain time stamps, except for the first one at 8:50 p.m. (Exs. 6B–6F.)

Unbeknownst to Dillon, K.R. had been drinking and bar hopping since earlier that afternoon. (Tr. at 180–81, 245–46.) K.R.'s friend McKenna testified she and K.R. started drinking around 1:30 or 2:00 p.m. at Mac's bar, where they had "maybe three drinks." (Tr. at 245–46.) K.R. did not recall that; she said she started drinking at the Acoma at around 3:00 p.m. and had three or four beers. (Tr. at 180, 327–28.) She then went to the Dublin and had multiple drinks there. (Tr. at 181.) Around 7:00 p.m., she went to Maloney's and had a beer and a shot. (Tr. at 182.) K.R. drove herself home from Maloney's and carried in groceries she bought earlier that day. (Tr. at 193, 210, 214–15.)

K.R. testified she remembered talking to two older men at Maloney's about mining and welding and then using the restroom. (Tr. at 182.) She did not remember anything after that. (Tr. at 182–83.) She had no recollection of messaging with or calling Dillon, leaving the bar, driving home, or how her sexual encounter with Dillon began. (Tr. at 183, 192.)

K.R. claimed the next thing she remembered after being at Maloney's was coming "out of a fog" at her home, in her bed, naked from the waist down, with her underwear in her hands, and having sex with

Dillon.[4] (Tr. at 179, 184, 217.) K.R. testified she told Dillon to stop, and he responded by pushing her head into the pillow and telling her she had "asked for it." (Tr. at 179, 185–88.) K.R. testified Dillon was having sex with her "as he said that." (Tr. at 188.) But when asked how long after that Dillon kept having sex with her, K.R. said she did not know. (Tr. at 188; *see also* Ex. 10 at 00:22:50–00:23:03.)

K.R. said that at some point after she said stop, Dillon stopped. (Tr. at 188.) He got up, asked K.R. where the bathroom was, and then used the bathroom. (Tr. at 188–89.) As he went to leave, K.R. claimed Dillon alerted her to the fact her dog had had an accident inside her home and she had left her stove on. (Tr. at 189.) Dillon then left. (Tr. at 189.)

K.R. called her friend Ellie and told her what happened, and Ellie called McKenna to tell her too. (Tr. at 190, 229, 241.) Ellie testified K.R. was crying and upset on the phone. (Tr. at 229.) Ellie and McKenna were "not the biggest fan[s] of" Dillon. (Tr. at 199, 243.) The three

[4] K.R. claimed she did not recognize Dillon at the time and only later determined it was him after reviewing her Facebook messages from earlier in the evening. (Tr. at 185, 190.)

friends texted that night about K.R.'s sexual encounter with Dillon, but law enforcement never recovered those messages. (Tr. at 209, 249.)

Ellie texted Dillon and asked if he had been at K.R.'s house earlier in the evening. (Ex. 7.) She said someone had come into K.R.'s house while she was sleeping. (Ex. 7.) Dillon told Ellie he had not been to K.R.'s house. (Ex. 7.) Dillon then immediately messaged K.R. to ask why Ellie was contacting him. (Ex. 6G.) He told K.R. that he told Ellie he had not been to K.R.'s house. (Ex. 6G.) He said he did not know why Ellie was asking this. (Ex. 6G.) Dillon told K.R. he was "not into people asking a ton of questions" and "I keep things private so yeah." (Ex. 6G.)

K.R. was dating another man at the time, and he had slept at her house the night before K.R. invited Dillon over. (Tr. at 236, 378.) As of five days after the alleged incident, K.R. had not told this other partner about her sexual encounter with Dillon. (Ex. 10 at 00:01:55, 00:9:35–00:10:33.)

After Ellie called McKenna that night, McKenna called the police. (Tr. at 241.) McKenna drove to K.R.'s house and met Officer Knopp there. (Tr. at 241–42.) She testified that when she arrived, K.R.

appeared upset. (Tr. at 242.) K.R. did not appear intoxicated to McKenna. (Tr. at 244, 250.)

Knopp arrived at K.R.'s house at about 12:50 a.m. (Tr. at 298.) She testified for the first time at trial that K.R. appeared intoxicated and smelled of alcohol. (Tr. at 299.) Knopp conceded she did not mention anything in her contemporaneous report about K.R. seeming drunk. (Tr. at 315.)

After Knopp interviewed K.R., McKenna drove K.R. to the hospital to do a sexual assault examination. (Tr. at 242.) Ellie came to the hospital to visit K.R. that night. (Tr. at 238.) Ellie testified K.R. did not exhibit any signs of intoxication and was articulate, cogent, aware of what was happening, and in control of her faculties. (Tr. at 238.)

The sexual assault nurse examiner (S.A.N.E.) met with K.R. at around 9:00 a.m. (Tr. at 277–78.) The nurse observed no signs of external vaginal trauma. (Tr. at 290.) K.R. declined to do an internal pelvic exam, which could have confirmed or denied the use of force during sex and the presence or absence of semen. (Tr. at 289–90.)

The S.A.N.E. nurse used a black light to identify a secretion just above K.R.'s labia. (Tr. at 273.) The nurse took a swab of the secretion,

and subsequent testing showed it contained sperm cells with Dillon's DNA. (Tr. at 273, 434.) Detective Sullivan, who interviewed K.R. several days later and oversaw the investigation, testified this secretion was not necessarily semen. (Tr. at 387–88.) He clarified the sperm cells could have been deposited there during sex through Dillon's pre-ejaculate fluid. (Tr. at 388.)

K.R. was not certain whether Dillon ejaculated during sex. She told Knopp she was "pretty sure" he ejaculated. (Ex. 8 at 00:20:35.) But she told the S.A.N.E. nurse she was "unsure" whether he ejaculated. (Tr. at 286.) During her interview with Sullivan, K.R. gave a muffled response to Sullivan's question whether Dillon ejaculated that *appears* to say he did ejaculate. (Ex. 10 at 00:24:00.) But Sullivan, who was in the room with and just feet from K.R., testified he believed K.R. said Dillon did *not* ejaculate. (Tr. at 387.)

K.R. did not mention Dillon ejaculating at all during her trial testimony. (Tr. at 176–225.) Knopp collected K.R.'s clothes and bedding from that night for forensic testing, but the State never produced any evidence that these items contained semen. (Tr. at 303–05.) Defense counsel argued in closing that the evidence did not show Dillon

ejaculated, which tended to undermine the State's claim that he kept going after K.R. said "stop." (Tr. at 482.)

The S.A.N.E. nurse checked a box on a form that K.R. claimed she had experienced a "lapse of consciousness" that night. (Ex. 3 at 3.) The nurse also documented that K.R. had a small scratch on her side and one on her wrist that she believed were not there prior to her blackout that night. (Tr. at 271.) The S.A.N.E. nurse observed no signs that K.R. was intoxicated. (Tr. at 265.)

A blood draw taken at 2:45 a.m. showed K.R. had a BAC of 0.148. (Tr. at 417–18.) The State introduced K.R.'s toxicology report at trial through Justin Lyndes, a crime lab forensic scientist. (Tr. at 417; Ex. 1.) Lyndes testified K.R.'s BAC was likely much higher than this at the time of her encounter with Dillon, because the blood draw occurred roughly six hours after the encounter. (Tr. at 418–19.) The State emphasized Lyndes' testimony and K.R.'s high BAC in opening and closing statements. (Tr. at 173, 465.)

Exclusion of Evidence of the Effects of Alcohol on K.R.

Before trial, the parties debated the admissibility of so-called "character" evidence about K.R. (Docs. 21, 37, 46, 47.) The defense said

it intended to introduce evidence that K.R. "regularly consumed large amounts [of] alcoholic beverages" and that "her tolerance allowed her to function unimpeded by the quantities of alcohol that would adversely affect individuals with a lower tolerance." (Doc. 46 at 2.) The purpose of this evidence, the defense argued, was to "demonstrate that [K.R.] was operating well within the limits of her own tolerance" when she had sex with Dillon. (Doc. 46 at 4.)

The defense proffered an expert witness, Dr. William George, who was a professor of psychology at the University of Washington. (3/4/2022 Hearing Transcript (3/4 Tr.) at 18–21; *see* Doc. 51 at 2.) Dr. George would have testified as to "whether or not somebody who is a regular consumer of alcohol would be more functional at a higher level of intoxication" than someone who was not. (3/4 Tr. at 19–20.) The District Court barred Dr. George's testimony. (Doc. 51 at 4.)

The Erroneous "Knowingly" Instruction

At the settling of instructions, the parties discussed how to instruct the jury on the mental state requirement that Dillon acted "knowingly." (Tr. at 439–40.) The defense proposed the following instruction: "A person (Dillon Pierce) acts knowingly with respect to

whether or not [K.R.] consented to sexual intercourse when Dillon Pierce *is aware* that [K.R.]; 1) expressed lack of consent through words or conduct; or 2) was physically helpless."[5] (Doc. 54.1 (emphasis added).)

Defense counsel explained, "This is a conduct-based offense, and so he has to knowingly – Mr. Pierce, to be convicted, has to know" that K.R. could not and/or did not consent to sex. (Tr. at 439.) Counsel argued this proposed instruction clarified "what the state has to prove in terms of what Mr. Pierce knew at the time." (Tr. at 439–40.)

The District Court rejected the defense's proposed instruction, opting instead to give the State's proposed result-based instruction. (Tr. at 440.) The given instruction read: "A person acts knowingly when the person is aware there exists *the high probability* that the person's conduct will cause a specific result." (Doc. 59, Instr. 16 (emphasis added).)

The District Court also instructed the jury on the elements of SIWOC, which included: (1) Dillon and K.R. had sex, (2) the sex "was

[5] These two prongs conformed to the State's two theories of the case: that K.R. was so drunk she was "physically helpless" and thus incapable of consent, or alternatively that she did initially consent but later withdrew her consent by saying "stop."

without the consent of [K.R.] and/or that she was incapable of consent," and (3) "The Defendant acted knowingly." (Doc. 59, Instr. 25.) A separate instruction defined consent. (Doc. 59, Instr. 19.) Another instruction defined the phrase, "incapable of consent," as meaning "a person who is physically helpless." (Doc. 59, Instr. 20.) The court instructed the jury a person is "physically helpless" when she "is unconscious or is otherwise physically unable to communicate unwillingness to act." (Doc. 59, Instr. 21.)

In closing argument, the State claimed K.R. was so drunk she was "physically helpless" and thus incapable of giving consent. (Tr. at 452–54, 458–59, 466–71.) The State alternatively argued that even if K.R. was capable of consent and did initially consent to sex, she verbally withdrew that consent when she told Dillon to stop, and Dillon did not stop. (Tr. at 461–62, 470–71.) The State read the "high probability" knowingly instruction aloud to the jury. (Tr. at 467.) It argued Dillon met this standard because he "knew that there was a high probability that . . . when she's this intoxicated she can't consent." (Tr. at 468.)

Defense counsel told the jury in response, "[T]he facts say that he didn't have any idea that she was as drunk as she was because she was fully functional. She was texting, she was driving, she was talking to the police, she was carrying in her groceries. *How was he supposed to know?*" (Tr. at 491 (emphasis added).)

STANDARDS OF REVIEW

"The standard of review for jury instructions is whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case." *State v. Hamernick*, 2023 MT 249, ¶ 13, 414 Mont. 307, 545 P.3d 666. This Court reviews a trial court's ruling on jury instructions for an abuse of discretion. *Hamernick*, ¶ 13. A court abuses its discretion when it issues instructions that incorrectly describe the applicable law. *See State v. Christiansen*, 2010 MT 197, ¶ 7, 357 Mont. 379, 239 P.3d 949.

Jury instructions that "relieve the State of its burden to prove every element of the charged offense beyond a reasonable doubt violate the defendant's due process rights." *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 10, 400 Mont. 46, 462 P.3d 1219. An alleged due process violation is a question of law this Court reviews for correctness. *Zerbst*, ¶ 10.

A district court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Lake*, 2019 MT 172, ¶ 22, 396 Mont. 390, 445 P.3d 1211. However, that discretion "is limited by" the defendant's constitutional right to present a complete defense. *State v. Polak*, 2018 MT 174, ¶ 17, 392 Mont. 90, 422 P.3d 112.

SUMMARY OF THE ARGUMENT

This case hinged on what Dillon *knew* about K.R.'s capacity to consent when she invited him to her house at night and they had sex. The District Court incorrectly instructed the jury it could find Dillon guilty if he was merely aware of a "high probability" K.R. could not consent to sex based on the amount of alcohol she drank that night. The correct instruction should have been that Dillon had to be *aware* K.R. was so drunk she was incapable of consent.

This incorrect instruction prejudiced Dillon's defense, because the whole case was about what Dillon knew. The instruction lowered the State's burden of proof on the key element in dispute at trial, violating Dillon's right to due process.

The State used evidence of K.R.'s substantial alcohol consumption that night—including scientific evidence of her high BAC—to create an

inference that she was so drunk she was incapable of consent and Dillon knew this. The District Court wrongly prohibited the defense from countering this with expert testimony about the effects of routine alcohol consumption on a person's perceptible level of intoxication.

The excluded testimony would have given context to the BAC evidence; harmonized it with the seemingly conflicting evidence that K.R. was fully functional that night even while supposedly blacked out; and rebutted the State's inference that K.R.'s high BAC meant she was presumptively—and perceptibly—incapable of consent. This was an abuse of discretion and a violation of Dillon's constitutional right to present a complete defense.

Under either or both errors, reversal and remand for a new trial is warranted.

ARGUMENT

I. The District Court incorrectly instructed the jury on the central element in dispute, lowering the State's burden of proof and violating Dillon's due process right.

A. The district court gave the jury the wrong definition of "knowingly."

SIWOC occurs when a person "knowingly has sexual intercourse with another person without consent or with another person who is

incapable of consent." Mont. Code Ann. § 45-5-503 (2019)[6]. "Consent" means "words or overt actions indicating a freely given agreement to have sexual intercourse." Mont. Code Ann. § 45-5-501(1)(a). Freely given consent may be later withdrawn through words or conduct. § 45-5-501(1)(a)(i). A person is "incapable of consent" when that person is "physically helpless."[7] § 45-5-501(1)(b)(ii). A person is physically helpless when they are "unconscious or [ ] otherwise physically unable to communicate unwillingness to act." Mont. Code Ann. § 45-2-101(58).

The term "knowingly" has several definitions. Pertinent here, "a person acts knowingly with respect to *conduct* . . . described by a statute defining an offense when the person is *aware* of the person's own conduct." § 45-2-101(35) (emphasis added). "A person acts knowingly with respect to the *result* of conduct described by a statute defining an

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[6] All references in this brief to the SIWOC and related statutes are to the 2019 version of the law, which was in effect at the time of the alleged offense.

[7] Although § 45-5-501(1)(b) contains several categories of persons who are "incapable of consent," the District Court instructed the jury (upon the State's prompting) that this phrase has only one meaning pertinent here: A person who is physically helpless. (Doc. 59, Instr. 20; Doc. 50, Proposed Instr. 16.) Under the "law of the case" doctrine, because the jury was instructed that "incapable of consent" means *only* "physically helpless," the State's evidence had to conform to that particular definition to support a conviction. *State v. Azure*, 2008 MT 211, ¶¶ 23, 28, 344 Mont. 188, 186 P.3d 1269.

offense when the person is aware that it is *highly probable* that the result will be caused by the person's conduct." § 45-2-101(35) (emphasis added).

"A district court's function during trial is to instruct the jury accurately and to correctly state the law applicable in the case." *State v. Ragner*, 2022 MT 211, ¶ 30, 410 Mont. 361, 521 P.3d 29. The court must choose which of the several definitions of "knowingly" applies in a particular case and instruct the jury on that definition alone. *State v. Rowe*, 2024 MT 37, ¶ 30, 415 Mont. 280, 543 P.3d 614.

Defense counsel asked the District Court to instruct the jury on the conduct-based definition of knowingly; that Dillon had to be "aware" the sex was without K.R.'s consent. (Doc. 54.1; Tr. at 439–40.) Instead, the District Court instructed the jury on the result-based definition; that Dillon had to be aware only of a "high probability" that his conduct could cause a specific result (the result of sexual intercourse without K.R.'s consent). (Doc. 59, Instr. 16; Tr. at 440.) The District Court gave the wrong instruction.

SIWOC is a conduct-based offense, requiring the conduct-based definition of knowingly. *Hamernick*, ¶¶ 26–27; *Rowe*, ¶ 31 (collecting

cases); *State v. Deveraux*, 2022 MT 130, ¶ 32, 409 Mont. 177, 512 P.3d 1198; *Ragner*, ¶¶ 28, 34. "For SIWOC, the prohibited particularized conduct itself—engaging in sexual intercourse with another person *without that person's consent*—gives rise to the entire criminal offense, and requires only a conduct-based instruction." *Deveraux*, ¶ 32 (emphasis in original).

In *Hamernick*, the defendant proposed a single, conduct-based instruction for the offense of SIWOC. *Hamernick*, ¶ 12. But the district court segmented the offense into separate components—"has sexual intercourse" and "without consent"—and gave different "knowingly" definitions for each. *Hamernick*, ¶ 18. For "has sexual intercourse," the court gave a conduct-based instruction. *Hamernick*, ¶ 18. But for "without consent," the court gave a "high probability-of-a-fact definition of knowingly." *Hamernick*, ¶ 18.

Relying on *Deveraux*, this Court held, "The crime of SIWOC is a conduct-based offense, necessitating an 'awareness of conduct' mental state instruction." *Hamernick*, ¶ 26. The Court reasoned the offense of SIWOC "does not consist of sexual intercourse with a high probability the other person does not consent; rather, it is sexual intercourse with

the awareness that it is *without* that person's consent." *Hamernick*, ¶ 26 (emphasis in original). Thus, "the question must be whether [the defendant] was aware of his conduct." *Hamernick*, ¶ 26. Because the district court in that case failed to give the jury the correct conduct-based definition of "knowingly" with respect to lack of consent, it "failed to 'fully and fairly instruct the jury as to the applicable law.'" *Hamernick*, ¶ 27.

Just like in *Hamernick*, the SIWOC charge here was a conduct-based offense requiring a conduct-based definition of knowingly. The District Court incorrectly told the jury SIWOC was a result-based offense. The question put to the jury *should* have been, "Was Dillon *aware* his sexual encounter with K.R. was not consensual?" *See Hamernick*, ¶ 26. Instead, the question posed to this jury was, to paraphrase, "Was Dillon aware it was *highly probable* the sexual encounter was without K.R.'s consent?"

Although a district court has broad discretion when formulating jury instructions, that discretion is subservient to the rule that the instructions must fully and fairly instruct the jury on the applicable law. *Christiansen*, ¶ 7. The court's "knowingly" instruction here was a

clear misstatement of the law. *Hamernick*, ¶¶ 26–27; *Deveraux*, ¶ 32. To boot, it misstated the law on the central issue in dispute—whether Dillon *knew* K.R. was too drunk to consent to sex. The District Court abused its discretion by issuing this instruction.

B. The erroneous instruction lowered the State's burden of proof on the key element in dispute, violating due process and requiring a new trial.

"This Court will reverse a conviction and order a new trial if an erroneous jury instruction prejudicially affects the defendant's due process rights." *Zerbst*, ¶ 27. To establish that a legal error did *not* prejudicially affect the defendant's substantial rights, the State must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also State v. Scarborough*, 2000 MT 301, ¶ 51, 302 Mont. 350, 14 P.3d 1202 (holding instructional error was not prejudicial because it "could have had no effect on the outcome of the trial").

The Due Process Clauses of the United States and Montana Constitutions require the State to prove all elements of the offense beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993); *State v. Clark*, 1998 MT 221, ¶ 29, 290 Mont. 479, 964 P.2d 766;

U.S. Const. amend. V; Mont. Const. art. II, § 17. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty . . .." *Sullivan*, 508 U.S. at 278 (emphasis in original).

Telling the jury it need only find Dillon was aware of a high probability that his sexual encounter with K.R. was not consensual—rather than that he was actually aware of such—impermissibly lowered the State's burden of proof and violated due process. *See State v. Gerstner*, 2009 MT 303, ¶ 31, 353 Mont. 86, 219 P.3d 866.

In *Gerstner*, a sexual assault case, the district court gave the jury a conduct-based definition of knowingly. *Gerstner*, ¶ 26. The defendant argued this was error and the court should have given the result-based definition. *Gerstner*, ¶ 28.

This Court held the district court gave the correct instruction and noted that in any event, the defense's proposed instruction would not have helped the defense. *Gerstner*, ¶ 31. The Court explained that the result-based, "high probability" definition the defense sought "would have decreased, rather than increased the State's burden of proof." *Gerstner*, ¶ 31. The Court explained, "Had the jury been instructed that, to convict, Gerstner only had to be aware of the high probability that

the contact was sexual in nature, the State's burden of proof would have been lessened." *Gerstner*, ¶ 31; *accord Rowe*, ¶ 31 (stating "the result-based definition of knowingly lowered the State's burden of proof [as compared to the conduct-based definition] and should not have applied to the conduct-based crime of sexual assault") (emphasis added).

The District Court's erroneous, result-based definition of knowingly lowered the State's burden of proof. *Gerstner*, ¶ 31; *Rowe*, ¶ 31. Allowing the jury to find Dillon guilty on less proof than the SIWOC statute requires was a violation of due process. *Sullivan*, 508 U.S. at 277–78; *Clark*, ¶ 29; *see Hamernick*, ¶ 23.

This instructional error prejudiced Dillon's substantial rights because it easily could have been the difference between a guilty verdict and a hung jury or not guilty verdict. The State cannot convincingly establish that reducing its burden of proof on the key element in dispute had zero impact on the verdict. *See Chapman*, 386 U.S. at 24; *Scarborough*, ¶ 51.

The State's primary theory of Dillon's guilt—on which the majority of its evidence and argument focused—was that K.R. was so drunk she was incapable of consent. (*See* Tr. at 452–54, 458–59,

466–71.) The case thus hinged on whether Dillon knew K.R. was drunk to the point of being physically helpless. It was imperative for the District Court to correctly instruct the jury on the definition of "knowingly," because the extent of Dillon's knowledge was the main question the jury had to decide.

A reasonable juror could have doubted whether K.R. appeared to Dillon to be so drunk she was physically helpless and thus incapable of consent. The State presented evidence of K.R.'s intoxication; that she drank a large number of alcoholic beverages, had a high level of alcohol in her system, and claimed she "blacked out."

But outwardly, K.R. was doing things that normally only a slightly or moderately intoxicated person could do. She held a coherent conversation with Dillon on Facebook Messenger. She called him. She texted him her address, invited him over, and consciously left the door unlocked for him. She was aware she had to work at 5:00 a.m., and she was conscientious about her 11:00 p.m. bedtime. (Exs. 6B–6F.) She drove herself home from the bar and brought in her groceries. (Tr. at 193, 210, 214–15.) She did all these things *while* she was supposedly blacked out for hours. A juror could reasonably conclude these were not

the actions of someone who was "unconscious" or "physically unable to communicate unwillingness to act." (Doc. 59, Instr. 21.)

From Dillon's point of view, K.R. was conscious, communicative, and in control. Although K.R. told Dillon she was "fucked [u]p" and could not find her car, Dillon reasonably could have interpreted this as flirtatious banter from a moderately, not severely, drunk person. After all, K.R. told Dillon this *after* his sexually suggestive text in which he asked, "what would I get" for going out with her and called her, "lil lady." (Exs. 6C, 6D.)

Consistent with Dillon's observations, McKenna and Ellie both testified K.R. did not appear drunk at all in the hours after the alleged incident. (Tr. at 238, 244, 250.) Given all this evidence, it would have been entirely plausible for the jury to conclude Dillon was not "aware" K.R. was so drunk she was physically helpless. Even if the jury concluded K.R. was in fact incapable of consent, that was not the extent of the inquiry; Dillon had to *know* this. *See Hamernick*, ¶¶ 26–27.

But the jury was never properly instructed to decide what Dillon knew. Had it received the correct instruction of "knowingly," raising the State's burden of proof on the key issue in dispute, it is entirely possible

the jury would have issued a different verdict. That the jury theoretically still *could* have found Dillon guilty is irrelevant. "[I]t makes no difference what a rational trier of fact *could* have found based on the evidence in this case, because we do not know what this jury *would* have found had it been correctly instructed regarding the law applicable to this case." *State v. Lambert*, 280 Mont. 231, 238, 929 P.2d 846, 851 (1996) (Trieweiler, J., concurring) (emphasis in original).

The State's backup theory was that even if K.R. was capable of consent and did initially give Dillon consent to have sex with her, she withdrew that consent when she said, "stop," and Dillon ignored her demand and kept going. It is unlikely the jury found Dillon guilty of SIWOC based purely on this theory.

The State supported its "incapable of consent" theory not only with K.R.'s testimony but also circumstantially through her messages with Dillon and evidence about her heavy drinking, high BAC, and blackout that night. By contrast, the State's "withdrawal of consent" theory was supported *only* by K.R.'s testimony, nothing more. But even K.R. was not entirely clear on the exact details of her interactions with Dillon during sex.

K.R. could not say definitively whether or not Dillon kept having sex with her after she told him to stop. (Tr. at 188; Ex. 10 at 00:22:50–00:23:03.) Although she testified he immediately responded to her demand by pushing her head down and saying she had "asked for it," she gave no context for what Dillon meant when he supposedly said and did this. K.R. could not say with certainty what happened next. She could not definitively recall whether he ejaculated (which would have suggested he did not stop when she said stop), and the State produced no forensic evidence that he did. Jurors may well have doubted whether the State proved beyond a reasonable doubt that Dillon ignored K.R.'s request to stop and kept going.

Given the State's emphasis on its core "incapable of consent" theory and the relative weakness of its evidence on the "withdrawal of consent" theory, it is probable the jury found Dillon guilty because of the former, not the latter. The erroneous knowingly instruction bore directly on the "incapable of consent" theory upon which the jury most likely found Dillon guilty.

In *Hamernick*, this Court explained that the wrong knowingly instruction "seriously eroded" the defense's theory of innocence, which

was that perhaps the alleged victim did not in fact consent, but Hamernick did not *know* that. *Hamernick*, ¶ 23. The same goes here; the defense theory was that K.R. was intoxicated, but Dillon did not *know* she was drunk beyond the point of being able to consent. (Tr. at 485, 491.) As in *Hamernick*, the erroneous instruction "undermined [Dillon's] defense by improperly lowering the State's burden of proof" on a critical disputed issue, thereby "prejudicially affect[ing] [his] substantial rights." *Hamernick*, ¶ 27; *accord Rowe*, ¶ 33 ("The jury instruction here lowered the State's burden of proof [on the element of knowingly] . . . and thus affected Rowe's substantive rights.").

The jury asked the judge during deliberations, "What happens if we don't come to a unanimous decision?"[8] (Doc. 59.1.) This indicates the jury seriously grappled with the facts and whether the State had satisfied even its reduced burden of proof. The State cannot establish with certainty that the incorrect instruction lowering its burden of proof on the main element in dispute had no bearing on a single juror's vote.

[8] After submitting this question, the jury ultimately rendered its verdict before the parties and court could convene to settle on a response. (Tr. at 496–97.)

II. The District Court wrongly excluded relevant, admissible evidence bearing on Dillon's core defense that he did not know K.R. was incapable of consent.

A. Evidence of the effects of alcohol on K.R.'s perceptible level of intoxication was relevant and admissible.

"All relevant evidence is admissible," absent a particular legal basis to exclude it. M. R. Evid. 402. Evidence is "relevant" when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M. R. Evid. 401; *accord State v. Ellison*, 2018 MT 252, ¶ 11, 393 Mont. 90, 428 P.3d 826 ("[E]vidence is relevant if it has any value, 'as determined by logic and experience, in proving the proposition for which it is offered.'").

The State sought to prove K.R. lacked capacity to consent to sex by introducing evidence of her internal level of intoxication: how many drinks she had, what her BAC was, and that she drank so much she blacked out. But this evidence did not necessarily speak to how drunk she *appeared* to outside observers like Dillon.

The excluded expert testimony would have provided the jury with information about how alcohol affects people differently, depending on their experience with drinking. (*See* 3/4 Tr. at 19–20; Doc. 46 at 2.) Dr.

George would have offered a scientific explanation of how someone like K.R., who drinks routinely, may exhibit fewer outward signs of intoxication than her number of drinks and BAC alone would suggest. (*See* 3/4 Tr. at 19–20; Doc. 46 at 2, 4.)

The question of how drunk K.R. *seemed* to other people that night was very much "of consequence to the determination of the action." M. R. Evid. 401. If K.R. was stumbling, slurring her words, falling over, and passing out, that would tend to show Dillon was aware she was incapable of consent. On the other hand, if because of her experience with alcohol K.R. appeared cogent and entirely functional, that would cast doubt on whether Dillon was aware she was drunk beyond capacity to consent.

No witness testified to how drunk K.R. appeared around the time she met up with Dillon. To the contrary, almost every witness who interacted with K.R. in the hours after the incident testified she did *not* appear intoxicated at all, despite still having a high BAC. (Tr. at 238, 244, 250, 265.) The only witness to testify K.R. seemed drunk was Knopp, but Knopp did not mention that in her contemporaneous report. (Tr. at 315.) And McKenna, who interacted with K.R. at the exact same

time Knopp did, and who knew K.R. better than Knopp, specifically testified K.R. did not seem drunk. (Tr. at 244, 250.)

The excluded defense evidence would have reconciled two disparate, seemingly conflicting strands of evidence: that on the one hand, K.R. was subjectively very drunk (as evidenced by how many drinks she had, her high BAC, and her blackout); but on the other hand, she did not *seem* that drunk (as evidenced by her coherent conversation with Dillon, ability to drive herself home and bring in her groceries, and her friends saying she appeared sober later that night).

Had the jury heard from Dr. George that people who drink often tend to seem less intoxicated than they are, that would have harmonized this seemingly conflicting evidence into one credible narrative. It would have suggested that despite consuming a large number of drinks and having a high BAC that night, K.R. may have been able to function like a sober or only moderately intoxicated person. This would have rebutted the State's inference that a high BAC presumptively equates to incapacity to consent, and bolstered Dillon's defense that even if K.R. was drunk beyond capacity to consent, he could not tell.

This evidence thus had a "tendency" to make it "more probable" that Dillon was not aware K.R. was so drunk she was physically helpless and thus incapable of consent. M. R. Evid. 401. Dillon's awareness of K.R.'s level of intoxication was "of consequence to the determination of the action"—it was the crux of the State's prosecution. M. R. Evid. 401. This was relevant, admissible evidence, and the District Court abused its discretion by excluding it. *See* M. R. Evid. 402.

The District Court's rationale for exclusion was based on Rules of Evidence 403 and 404. (*See* Doc. 51 at 3.) Rule 404 generally prohibits character evidence to prove "action in conformity therewith" (*i.e.*, propensity), subject to certain exceptions. M. R. Evid. 404(a), (b). A propensity purpose would have been that K.R. was a heavy drinker in general, so K.R. must have drank heavily on the night in question. But there was no dispute K.R. drank heavily on the night in question; the State based its whole case on this fact, and the defense conceded this. This was not propensity-character evidence, so Rule 404's bar on such evidence did not apply.

Under Rule 403, otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice." M. R. Evid. 403. The District Court found this evidence would unfairly "paint the victim as an alcoholic and be used to inflame the jury against the victim." (Doc. 51 at 3.)

The problem with this rationale is that the jury already knew K.R. most likely had a drinking problem. The State told the jury K.R. began drinking heavily on a Thursday afternoon, drank to the point of blacking out even though she had to work at 5:00 a.m. the next morning, and drove her vehicle home from the bar while blackout drunk. Giving the jury slightly more detail about K.R.'s drinking habit and discussing the physiological effects of routine alcohol use would not have been more damaging to her character than what the jury already heard. *Cf. State v. Murphy*, 2021 MT 268, ¶¶ 5, 16, 406 Mont. 42, 497 P.3d 263 (explaining that where evidence of a person's "other acts" is "not more abhorrent than" his or her conduct properly discussed at trial, the other acts evidence is not unduly prejudicial under Rule 403).

This evidence would, however, have been meaningfully probative of a core issue in dispute: how Dillon likely perceived K.R.'s level of intoxication that night. The high probative value of this evidence was not "substantially outweighed" by its negligible prejudicial impact. *See*

M. R. Evid. 403. The District Court abused its discretion by excluding it under Rule 403.

B. The exclusion of this evidence violated Dillon's constitutional right to present a complete defense.

"Under the Sixth Amendment to the United States Constitution, and Article II, Section 24 of the Montana Constitution, criminal defendants have a constitutional right to confront their accuser and to present evidence in their own defense." *Lake*, ¶ 25; U.S. Const. amend. VI; Mont. Const. art. II, § 24. "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *State v. Colburn*, 2016 MT 41, ¶ 39, 382 Mont. 223, 366 P.3d 258 (McKinnon, J., concurring) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)); *accord Polak*, ¶ 17. This includes "the right to put before a jury evidence that might influence the determination of guilt." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988).

"[A]n essential component of procedural fairness is an opportunity to be heard." *Crane*, 476 U.S. at 690. "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on" a key issue "when such evidence is central to the defendant's claim of innocence." *Crane*, 476 U.S. at 690. Absent a valid

justification, "exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane*, 476 U.S. at 690–91.

By way of analogy, this Court has held that evidence otherwise barred by the rape shield statute, *see* Mont. Code Ann. § 45-5-511, must at times yield to the defendant's right to present a complete defense. *Lake*, ¶ 33; *Colburn*, ¶ 35 (holding the lower court's exclusion of evidence under the rape shield statute violated the defendant's right to present a complete defense, and reversing).

In *Lake*, the defendant was convicted of attempted SIWOC after the victim claimed he accosted her and ejaculated on her underwear. *Lake*, ¶ 10. The defendant claimed this incident did not occur, and forensic testing showed Lake's sperm cells were conspicuously absent from the victim's underwear. *Lake*, ¶ 12. At trial, the State argued the only reason Lake's sperm cells were not present was because the victim washed her underwear in the laundry after the incident. *Lake*, ¶ 34. But the district court barred the defense from introducing evidence that the victim's underwear *did* contain another man's sperm cells. *Lake*,

¶ 34. This evidence would have undermined the State's laundering theory, because if another man's sperm cells were still present on the underwear after washing, but Lake's were not, that suggested his sperm cells were never there in the first place. *Lake*, ¶ 34.

This Court held on appeal that even though the rape shield statute on its face barred such evidence, Lake was constitutionally permitted "to counter the State's narrative" with the evidence of the other man's sperm cells. *Lake*, ¶ 36. Because the State argued the laundering presumably washed away Lake's sperm cells, Lake was entitled to rebut that suggestion with evidence that the laundering did not, in fact, wash away sperm cells. *Lake*, ¶¶ 36, 38.

As in *Lake*, the State decided to put on evidence of how many drinks K.R. had that night and to call a forensic scientist to present a toxicology report of her high BAC. It "invited the jurors to make a common-sense inference" that if K.R. had that much alcohol in her system, Dillon must have known (or, in this case, been aware of a "high probability") she was incapable of consent. *See Lake*, ¶ 34. As in *Lake*, Dillon was constitutionally permitted to rebut the State's narrative

with evidence that despite her high BAC, K.R. likely did not appear as intoxicated as her alcohol consumption that night would suggest.

To the extent K.R. was less affected by alcohol than the average person, that was "evidence from which exculpatory inferences could be drawn." *See Lake*, ¶ 38. The evidence of how many drinks K.R. consumed, her BAC level, and her blackout, standing alone and without the context of the effects of alcohol on frequent drinkers, "provided the jury with an incomplete story." *See Lake*, ¶ 38. The proffered but excluded evidence would have given the jury the full story: that K.R. was drunk that night, but given her experience with alcohol, she probably appeared to others to be functional and capable of consent. This excluded evidence "was an essential part of [Dillon's] constitutional right to confront his accuser and to mount a meaningful defense." *Lake*, ¶ 38.

Not only is this case like *Lake*, but the balance here weighs even more heavily in favor of Dillon's right to present a complete defense. This Court in *Lake* had to balance the defendant's right to present a defense *against the rape shield statute*, which on its face demanded exclusion of the evidence at issue. *See Lake*, ¶ 24; § 45-5-511(2) (barring

"[e]vidence concerning the sexual conduct of the victim"). Here, the rape shield statute does not apply—the proffered evidence was about the probable effects of alcohol on K.R., not her sexual behavior. The District Court simply had to balance Dillon's constitutional right to present a complete defense against the marginal prejudice to K.R. of telling the jury she drank often—a fact the jury probably already assumed—and explaining the effects of alcohol on routine drinkers like her. That balance favored admission of the evidence.

C. This exclusion of evidence bearing directly on Dillon's core defense was not harmless.

When a district court excludes relevant, admissible evidence favorable to the defense, "the State must demonstrate there was no reasonable possibility that the exclusion contributed to the conviction." *State v. Slavin*, 2004 MT 76, ¶ 22, 320 Mont. 425, 87 P.3d 495.

As discussed above, this trial was primarily about what Dillon knew—based on K.R.'s outward, observable behavior—about her capacity to consent to sex. And as noted above, there was evidence from which jurors could reasonably conclude Dillon was not aware of the full extent of K.R.'s intoxication or that she was physically helpless. She held a coherent and lucid conversation with him, she was mindful of her

bedtime and work obligations, she drove herself home and brought in her groceries, and her own friends confirmed she did not seem drunk in the hours after the sexual encounter.

The excluded evidence would have shored up Dillon's defense that even if K.R. was subjectively so drunk she was incapable of consent, she did not appear that drunk. By extension, Dillon—who was not a mind reader and did not test K.R.'s blood alcohol concentration before having sex with her—was not "aware" she was incapable of consent. The State cannot prove that the exclusion of evidence concerning what Dillon could observe about K.R.'s level of intoxication had no influence on the jury.

CONCLUSION

The District Court incorrectly instructed the jury that the State only had to prove Dillon knew it was *highly probable* K.R. was incapable of consent, not that he was actually aware of this. The court compounded this error by excluding relevant, admissible expert testimony that bore on Dillon's central defense that he was not aware K.R. was too drunk to consent to sex. Each of these errors unfairly

undermined Dillon's defense and demands reversal and remand for a new trial.

Respectfully submitted this 12th day of June, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,402, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Michael Marchesini
MICHAEL MARCHESINI

APPENDIX

Judgment.....App. A

Given jury instruction on the definition of "knowingly" .....App. B

District Court order granting the State's motion in limine .....App. C

CERTIFICATE OF SERVICE

I, Michael Marchesini, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-12-2024:

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